

FOR PUBLICATION
UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
MODESTO DIVISION

In re)	Case No. 96-93899-A-7
TIMOTHY A. HOBLITZELL,)	
)	
)	
Debtor,)	
)	
)	
LINDA EKSTROM STANLEY, United)	Adv. No. 97-9083
States Trustee,)	
)	Motion Control No. None
)	
Plaintiff,)	
)	
vs.)	
)	
TIMOTHY A. HOBLITZELL,)	
)	
)	
Defendant.)	
)	

Edmund Gee, Esq., U.S. Department of Justice, Office of the United States Trustee, Fresno, California, appearing for the plaintiff, the United States Trustee.

James E. Ganzer, Esq., Ganzer & Williams, Stockton, California, appearing for the debtor and defendant, Timothy A. Hoblitzell.

MEMORANDUM DECISION

The United States Trustee has filed an adversary proceeding objecting to the discharge of the chapter 7 debtor under 11 U.S.C. §§ 727(a)(2)(B), (a)(3), and (a)(4)(A). The United States Trustee's objections will be sustained and the debtor's discharge will be denied.

1 I. Facts

2 On October 2, 1996, the defendant and debtor, Timothy
3 A. Hoblitzell, filed a chapter 13 petition. He timely filed
4 schedules and a statement of financial affairs, both executed
5 under penalty of perjury, as required by Fed.R.Bankr.P.
6 1007(b)(1). Schedule B listed a 24.5% stock ownership interest
7 in "Harvest Grove, Inc.," and a 3.5% partnership interest in
8 "Thermal Energy." The statement of financial affairs, question
9 10, indicated that the defendant transferred no property in the
10 year prior to his petition.

11 The defendant's attempt at rehabilitation under chapter
12 13 was short-lived. On December 16, 1996, he voluntarily
13 converted his case to one under chapter 7.

14 Approximately one month later, the defendant filed an
15 amendment to Schedule B. The amendment deleted any reference to
16 his stock interest in Harvest Grove, Inc., and to his partnership
17 interest in Thermal Energy. The defendant also amended his
18 statement of financial affairs, stating at question 10 that he
19 had sold his interests in Harvest Grove, Inc., and Thermal Energy
20 in January 1996 to his brother, James Hoblitzell, for \$2,000.00.

21 These contradictory statements under penalty of perjury
22 piqued the interest of the United States Trustee. Her
23 investigation revealed a wealth of information that was either
24 omitted from the defendant's schedules and statement of financial
25 affairs or was contradicted by the statements in them.

26 In addition to mischaracterizing his interest in
27 Thermal Energy and Harvest Grove, Inc., these documents failed to

1 disclose that the defendant held corporate officer positions in
2 two entities, that the defendant had transferred a partnership
3 interest in Kentucky House Energy Partnership, and that the
4 defendant had operated a proprietorship known as Live Oak
5 Insurance.

6 Thermal Energy Development Partnership (TEDP), a
7 limited partnership, owns a biomass power plant located in Tracy,
8 California. In 1996, it had assets of \$45.3 million and gross
9 income of \$14.9 million. However, its assets are exceeded by its
10 liabilities and in 1996 it had an operating loss.

11 Thermal Energy Development Corporation (TEDCO) is one
12 of the limited partners of TEDP. It owns approximately 17% of
13 the limited partnership. The defendant owned 1077.5 (10.775%)
14 shares of TEDCO. The defendant claims that he transferred these
15 shares to his brother on February 1, 1996, for \$1,000.00. The
16 defendant allegedly signed a bill of sale for the stock. Both
17 parties also purportedly signed a repurchase agreement which
18 permitted the defendant to reacquire the stock for a period in
19 excess of fifty years by repaying the \$1,000.00 plus interest.

20 Harvest Grove, Inc., is a California corporation.
21 PacWest Resources, Inc., (PacWest) owns 490 (49%) of its shares.
22 The defendant was an officer of PacWest and the owner of 990,000
23 (49.5%) of its shares. The defendant claims that he transferred
24 these shares to his brother on February 1, 1996, for \$1,000.00.
25 Once again, the defendant allegedly signed a bill of sale for the
26 stock and both parties signed a repurchase agreement which
27 permitted the defendant to reacquire the stock for a period in

1 excess of fifty years by repaying the \$1,000.00 plus interest.

2 The defendant was the president and secretary of
3 PacWest and was a vice-president of Harvest Grove.

4 In 1989, the defendant entered into a settlement
5 agreement concerning his stock ownership in TEDCO. By virtue of
6 this settlement agreement, if TEDCO or its assets are sold, the
7 defendant could receive \$500,000.00 for his stock.

8 On June 15, 1995, within two years of the petition, the
9 defendant transferred a 5% partnership interest in Kentucky House
10 Energy Partnership.

11 The defendant was the proprietor of Live Oak Insurance
12 within two years of the petition. While the defendant testified
13 that this business ceased operating in 1994, the defendant's tax
14 returns for 1995 and 1996 show that the business was still
15 generating income and incurring expenses in those years.

16 The defendant's schedules and statement of financial
17 affairs, then, were inaccurate in the following particulars:

18 (1) The original Schedule B reported a 3.5% interest in
19 "Thermal Energy." In fact, the defendant owned 10.77% of TEDCO
20 which owned 17% of TEDP. The defendant was not a partner of
21 TEDP.

22 (2) Nor was the defendant accurate in his original
23 Schedule B when he disclosed that he owned 24.5% of Harvest
24 Grove, Inc. In reality, he owned 990,000 shares, or 49.5%, of
25 PacWest. PacWest, in turn, owned 490 shares, or 49%, of Harvest
26 Grove, Inc.

27 (3) The ownership of more than 5% of the equity in
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1 TEDCO and PacWest should also have been disclosed by the
2 defendant at question 16a of the statement of financial affairs.

3 (4) In the original statement of financial affairs, the
4 defendant failed to disclose the February 1, 1996, transfers to
5 his brother for a total consideration of \$2,000.00. It should
6 have been disclosed at question 10 of the statement of financial
7 affairs.

8 (5) Within the two years prior to the petition,
9 defendant held a number of corporate posts. He was the president
10 and secretary of PacWest effective December 8, 1995. He was a
11 vice-president of Harvest Grove effective July 22, 1996. Both of
12 these positions should have been disclosed at question 16a of the
13 statement of financial affairs.

14 (6) If the defendant acquired the right to repurchase
15 his interests in "Thermal Energy" and "Harvest Grove," this
16 contract right should have been scheduled on Schedule B, at item
17 18, 20, or 33.

18 (7) The defendant's sale of his interest in Kentucky
19 House Energy Partnership on June 15, 1995, did not need to be
20 disclosed at question 10 of the statement of financial affairs
21 because the sale occurred more than one year before the filing of
22 the bankruptcy petition. The defendant's ownership of more than
23 a 5% partnership interest within the two years prior to his
24 petition, however, should have been disclosed at question 16a of
25 the statement of financial affairs.

26 (8) The defendant did not disclose the proprietorship
27 known as Live Oak Insurance or the right to receive residual
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1 commissions, either on Schedule B or at question 16a of the
2 statement of financial affairs.

3 Also, the court does not believe that the stock
4 interests in TEDCO and PacWest were transferred by the defendant
5 to his brother. This is suggested by the defendant's failure to
6 disclose the transfers in the original statement of financial
7 affairs filed while the case was pending under chapter 13. In
8 the original schedules, the defendant claimed to be the owner of
9 the stock in both companies. It was only after the case was
10 converted to chapter 7, when there was a possibility that a
11 chapter 7 trustee would sell the equity interests, that the
12 defendant claimed he no longer owned those interests.

13 The defendant and his brother tell conflicting stories
14 about possession of the share certificates. At the first meeting
15 of creditors the defendant testified that he gave the
16 certificates to his brother. His brother denies that he ever
17 received them. The defendant and his brother admit that they
18 have not maintained a close relationship over the years. Even
19 so, they offered significantly different versions of one of their
20 recent but rare contacts.

21 Finally, the timing of the request that the stock
22 transfers be recorded on the books of the corporations is
23 suspicious. Neither the defendant nor his brother reported the
24 transfers to the two corporations until after the conversion to
25 chapter 7 and eleven months after the purported transfers.

26 II. Discussion

27 This is a core proceeding over which the court has
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1 subject matter jurisdiction. 28 U.S.C. §§ 157(b)(2)(J) &
2 1334(b). The United States Trustee has standing to object to the
3 discharge of a chapter 7 debtor. 11 U.S.C. § 307.

4 To prevail under 11 U.S.C. §§ 727(a)(2)(B), (a)(3), or
5 (a)(4)(A), the trustee must establish the allegations of the
6 complaint by a preponderance of the evidence. Lansdowne v. Cox
7 (In re Cox), 41 F.3d 1294, 1297 (9th Cir. 1994). Objections to
8 discharge are to be literally and strictly construed against the
9 objector and liberally construed in favor of the debtor. First
10 Beverly Bank v. Adeeb (In re Adeeb), 787 F.2d 1339, 1342 (9th
11 Cir. 1986).

12 A.

13 Section 727(a)(4)(A) provides:

14 (a) The court shall grant the debtor a discharge
15 unless -

16 (4) the debtor knowingly and fraudulently, in
17 connection with the case -
(A) made a false oath or account

18 11 U.S.C. § 727(a)(4)(A).

19 Under section 727(a)(4)(A), the defendant's discharge
20 will be denied if it is proven that: (1) the defendant made a
21 statement under oath; (2) the statement was false; (3) the
22 defendant knew the statement was false; (4) the defendant made
23 the statement with fraudulent intent; and (5) the statement
24 related materially to the bankruptcy case. Weiner v. Perry,
25 Settles & Lawson, Inc. (In re Weiner), 208 B.R. 69, 71 (B.A.P.
26 9th Cir. 1997); In re Coombs, 193 B.R. 557, 563 (Bankr. S.D. Cal.
27 1996). The debtor's knowledge and fraudulent intent may be shown

1 by circumstantial evidence and inferred from the debtor's course
2 of conduct. Cf. In re Devers, 759 F.2d 751, 753-754 (9th Cir.
3 1985).

4 From the evidence the court infers that the defendant
5 sought to maintain control over his shares in TEDCO and PacWest
6 and keep them out of the hands of his creditors and the trustee.
7 When the case was proceeding under chapter 13, that is, when the
8 defendant was permitted to remain in possession of his assets, he
9 reported that he owned the stock. When he converted his case to
10 chapter 7 and faced the prospect of losing his shares to the
11 trustee, he falsely reported that he had transferred his shares
12 to his brother.

13 There were additional significant omissions and false
14 statements in the schedules and the statement of financial
15 affairs which are summarized above. These omissions and false
16 statements are so intertwined with the defendant's recent
17 business and financial affairs that the court infers his failure
18 to make full and accurate disclosure in his statements under oath
19 was intentional and was for the purpose of deceiving creditors
20 and the trustee.

21 It is no defense that the defendant believed the TEDCO
22 and PacWest stock to be worthless. See e.g., In re Bailey, 147
23 B.R. 157, 162-163 (Bankr. N.D. Ill. 1992). First, the stock may
24 not be worthless. By virtue of the state court settlement, if
25 TEDCO is sold, the defendant could some day receive \$500,000.00
26 for his stock. Someone might be willing to purchase the stock
27 from the bankruptcy estate to capture this potential gain. If no
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1 buyer appears, the trustee might request pursuant to 11 U.S.C. §
2 554(c) that the stock not be abandoned when the case was closed,
3 in order to preserve any subsequent sale proceeds for the benefit
4 of creditors. See e.g., In re Hart, 76 B.R. 774, 777-778 (Bankr.
5 C.D. Cal. 1987). By failing to disclose the settlement and by
6 falsely reporting the transfer of the stock, the defendant
7 attempted to preclude either possibility.

8 But even if the court were to conclude that the stock
9 was worthless, it was not for the defendant to decide which of
10 his assets had to be disclosed. All assets must be scheduled so
11 that "those interested in the case, in particular the trustee,
12 have accurate information upon which they can rely without having
13 to dig out the true facts or conduct examinations." In re
14 Bailey, 147 B.R. at 162.

15 A disclosure's materiality is not determined by whether
16 it may financially prejudice the estate or creditors. An omitted
17 asset may ultimately be found to have no value, but its
18 disclosure is necessary "if it aids in understanding the debtor's
19 financial affairs and transactions." In re Coombs, 193 B.R. at
20 564.

21 The defendant's false oaths enumerated above are
22 material because they concern the defendant's assets, the
23 disposition of assets, and the business dealings which caused or
24 contributed to the defendant's insolvency.

25 The defendant's discharge will be denied because he
26 knowingly made false oaths regarding material facts with the
27 intent to deceive the trustee.

1 B.

2 Section 727(a)(2)(B) provides:

3 (a) The court shall grant the debtor a discharge
4 unless-

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6 (2) the debtor, with intent to hinder, delay, or
7 defraud a creditor or an officer of the estate charged
8 with custody of property under this title, has
9 transferred, removed, destroyed, mutilated, or
10 concealed, or has permitted to be transferred, removed,
11 destroyed, mutilated, or concealed -

12
13 (B) property of the estate, after the date of the
14 filing of the petition

15 11 U.S.C. § 727(a)(2)(B). According to the Ninth Circuit:

16 "To deny a discharge under this section, the court must
17 find that the Debtors harbored actual intent to hinder,
18 delay or defraud a creditor or officer of the estate .
19 . . . We infer the intent from the circumstances
20 surrounding the transaction."

21 In re Woodfield, 978 F.2d 516, 518 (9th Cir. 1992).

22 Because the court has already concluded that the
23 defendant falsely reported the transfer of the stock with the
24 purpose of deceiving the trustee, it follows that his false oath,
25 as well as the other misrepresentations enumerated above, were
26 made with the intent of concealing property of the estate from
27 the trustee.

28 If the court is wrong and the stock transfer did occur,
the result will not change. In this event, the defendant failed
to disclose in his schedules or his statement of financial
affairs that he retained the right to repurchase the stock.
Either way, an asset was concealed from the trustee and for this
the defendant's discharge must be denied.

1 C.

2 Section 727(a)(3) provides:

3 (a) The court shall grant the debtor a discharge
4 unless -

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6 (3) the debtor has . . . failed to keep or preserve any
7 recorded information . . . from which the debtor's
8 financial condition or business transactions can be
9 ascertained

10 11 U.S.C. § 727(a)(3).

11 The debtor produced only six documents during discovery
12 regarding his marital dissolution proceeding, his bank accounts,
13 and his investments in various partnerships and corporations.
14 Given the complexity of the defendant's business dealings, his
15 lack of records is astounding. When challenged regarding this on
16 cross examination, he stated that he was not a "detail" person.

17 The defendant's failure to keep records goes beyond
18 mere inattention to detail. His failure to keep and preserve
19 basic records such as bank statements, as well as his failure to
20 make complete and accurate disclosure in his schedules and the
21 statement of financial affairs, was not only unreasonable, it
22 betrays a deliberate attempt to hinder and delay the trustee in
23 his efforts to investigate the defendant's financial affairs.

24 The defendant's discharge shall also be denied pursuant
25 to 11 U.S.C. § 727(a)(3).

26 III. Conclusion

27 For the foregoing reasons, the court will enter
28 judgment denying the discharge of the debtor pursuant to 11
U.S.C. § 727(a)(2)(B), (a)(3), and (a)(4)(A).

1 Dated:

2 By the Court

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5 Michael S. McManus
6 United States Bankruptcy Court
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